

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALAN F. ROBERTSON,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration¹,

Defendant.

NO: 12-CV-3116-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment (ECF Nos. 19 and 20). Plaintiff is represented by Victoria Chhagan.

¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Under Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

1 Defendant is represented by Kathy Rief. This matter was submitted for
2 consideration without oral argument. The Court has reviewed the administrative
3 record and the parties' completed briefing and is fully informed. For the reasons
4 discussed below, the Court grants Defendant's motion and denies Plaintiff's
5 motion.

6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g);
8 1383(c)(3).

9 STANDARD OF REVIEW

10 A district court's review of a final decision of the Commissioner of Social
11 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is
12 limited: the Commissioner's decision will be disturbed "only if it is not supported
13 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
14 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means
15 relevant evidence that "a reasonable mind might accept as adequate to support a
16 conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently,
17 substantial evidence equates to "more than a mere scintilla[,] but less than a
18 preponderance." *Id.* (quotation and citation omitted). In determining whether this
19 standard has been satisfied, a reviewing court must consider the entire record as a
20 whole rather than searching for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the Commissioner. If the evidence in the record “is
3 susceptible to more than one rational interpretation, [the court] must uphold the
4 ALJ’s findings if they are supported by inferences reasonably drawn from the
5 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district
6 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
7 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
8 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
9 The party appealing the ALJ’s decision generally bears the burden of establishing
10 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

11 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

12 A claimant must satisfy two conditions to be considered “disabled” within
13 the meaning of the Social Security Act. First, the claimant must be “unable to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which
16 has lasted or can be expected to last for a continuous period of not less than twelve
17 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
18 “of such severity that he is not only unable to do his previous work[,] but cannot,
19 considering his age, education, and work experience, engage in any other kind of
20

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
5 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
6 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
7 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
8 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
9 404.1520(b); 416.920(b).

10 If the claimant is not engaged in substantial gainful activities, the analysis
11 proceeds to step two. At this step, the Commissioner considers the severity of the
12 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
13 claimant suffers from “any impairment or combination of impairments which
14 significantly limits [his or her] physical or mental ability to do basic work
15 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
16 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
17 however, the Commissioner must find that the claimant is not disabled. *Id.*

18 At step three, the Commissioner compares the claimant’s impairment to
19 several impairments recognized by the Commissioner to be so severe as to
20 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§

1 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
2 severe than one of the enumerated impairments, the Commissioner must find the
3 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

4 If the severity of the claimant's impairment does meet or exceed the severity
5 of the enumerated impairments, the Commissioner must pause to assess the
6 claimant's "residual functional capacity." Residual functional capacity ("RFC"),
7 defined generally as the claimant's ability to perform physical and mental work
8 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
9 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
10 analysis.

11 At step four, the Commissioner considers whether, in view of the claimant's
12 RFC, the claimant is capable of performing work that he or she has performed in
13 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv);
14 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
15 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
16 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the
17 analysis proceeds to step five.

18 At step five, the Commissioner considers whether, in view of the claimant's
19 RFC, the claimant is capable of performing other work in the national economy.
20 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,

1 the Commissioner must also consider vocational factors such as the claimant's age,
2 education and work experience. *Id.* If the claimant is capable of adjusting to other
3 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
5 work, the analysis concludes with a finding that the claimant is disabled and is
6 therefore entitled to benefits. *Id.*

7 The claimant bears the burden of proof at steps one through four above.
8 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
9 the analysis proceeds to step five, the burden shifts to the Commissioner to
10 establish that (1) the claimant is capable of performing other work; and (2) such
11 work "exists in significant numbers in the national economy." 20 C.F.R. §§
12 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

13 ALJ'S FINDINGS

14 Plaintiff filed concurrent applications for supplemental security income
15 disability benefits and disability insurance benefits on November 16, 2004. Tr. 77-
16 81. He alleged an onset date of February 1, 2004. Tr. 1046. These applications
17 were denied initially and upon reconsideration and a hearing was requested. Tr.
18 821-21. A hearing was held before an Administrative Law Judge ("ALJ") in
19 December 2007. The ALJ rendered a decision denying Plaintiff benefits on
20 January 7, 2008. Plaintiff appealed this decision to the United States District Court

1 for the Western District of Washington, which granted a stipulated motion to
2 remand the case for further consideration on October 8, 2009. Tr. 1065-66.

3 A second hearing was held before an ALJ on April 14, 2010. Tr. 1045. The
4 ALJ rendered a decision denying Plaintiff benefits on June 22, 2010. Tr. 1045-59.
5 The ALJ concluded at step one that Plaintiff had not engaged in substantial gainful
6 activity since the alleged onset date. Tr. 1048. At step two, the ALJ found that
7 Plaintiff had severe impairments consisting of depressive disorder not otherwise
8 specified and polysubstance abuse in remission. Tr. 1048. At step three, the ALJ
9 found that Plaintiff's severe impairments did not meet or medically equal the
10 listings found in 20 C.F.R. Pt. 404, Subpt. P, App'x 1. Tr. 1049. At step four, the
11 ALJ found that Plaintiff had the residual functional capacity to perform a full range
12 of work at all exertional levels consisting of simple routine tasks which required
13 only occasional contact with the general public. Tr. 1050-56. At step five, the
14 ALJ concluded that there were a significant number of jobs existing in the national
15 economy which Plaintiff could perform in view of his residual functional capacity
16 and denied his claims on that basis. Tr. 1057.

17 The Appeals Council denied Plaintiff's request for review on July 25, 2012,
18 making the ALJ's decision the Commissioner's final decision for purposes of
19 judicial review. Tr. 1028-30; 20 C.F.R. §§ 404.981, 416.1484, and 422.210.

ISSUES

Plaintiff raises four issues for review:

1. Did the ALJ err in failing to properly consider the limiting effects of Plaintiff's auditory hallucinations?
2. Did the ALJ improperly reject lay witness testimony concerning the severity of Plaintiff's impairments?
3. Did the ALJ err at step five?

DISCUSSION

A. Consideration of Plaintiff's Auditory Hallucinations

Plaintiff asserts that the ALJ erred in failing to list Plaintiff's auditory hallucinations as a severe impairment at step two. ECF No. 19 at 5-17. While styled as a step two challenge, this argument is better addressed to the ALJ's findings at step four. Given that the ALJ expressly considered the effects of Plaintiff's auditory hallucinations in fashioning the RFC, any potential error at step two was harmless. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (holding that ALJ's failure to list plaintiff's bursitis as a severe impairment at step two was harmless where ALJ considered limitations caused by the condition at step four).

Having carefully reviewed the record, the Court finds that the ALJ did not err in evaluating the limiting effects of Plaintiff's auditory hallucinations. While there is no dispute that Plaintiff does, in fact, suffer from auditory hallucinations,

1 there is little to suggest that the hallucinations materially interfere with his ability
2 to work. As a threshold matter, the medical evidence illustrates that Plaintiff
3 responds well to medication (specifically Ziprasidone) designed to reduce his
4 auditory hallucinations. Plaintiff reported to Dr. Rogers in June 2005 that the
5 voices in his head “have been almost completely eliminated with Ziprasidone.” Tr.
6 396. During a follow-up visit with Dr. Rogers in October 2005, Plaintiff reported
7 that an increase in his Ziprasidone dosage further decreased the frequency and
8 intensity of his auditory hallucinations. Tr. 375. Plaintiff made similar reports to
9 Dr. Jensen in November 2008 and April 2009, explaining that while his auditory
10 hallucinations persisted, they were generally well controlled by his medication. Tr.
11 1132, 1135. As a result, Dr. Jensen concluded that Plaintiff was “stable, which
12 includes chronic [auditory hallucinations].” Tr. 1132. This evidence clearly
13 supports the ALJ’s conclusion that Plaintiff’s auditory hallucinations are not as
14 debilitating as alleged.

15 Furthermore, the medical evidence reflects that Plaintiff’s auditory
16 hallucinations do not substantially interfere with his ability to interact with others.
17 From 2005 through 2009, Plaintiff routinely made meaningful contributions during
18 group therapy sessions and almost never needed to be prompted to participate.
19 Plaintiff was also able to successfully work alongside others during his vocational
20 rehabilitation work at the VA hospital in Seattle. Indeed, Plaintiff reported to his

1 physician, Dr. Doles, in October 2008 that he enjoyed working in the Physical
2 Therapy department, hoped to land a permanent paid position there in the future,
3 and felt that he had a good relationship with department staff. Tr. 1137. From
4 these positive reports, Dr. Jensen concluded in June 2009 that working alongside
5 others actually *minimized* the effects of Plaintiff's auditory hallucinations. In view
6 of this evidence, the ALJ did not err in finding that Plaintiff was able to "perform
7 simple and routine tasks with [only] occasional contact with the public." Tr. 1055.

8 Finally, the ALJ did not err in giving only "minimal weight" to the opinions
9 of Dr. Cotton, Dr. Bondurant, Dr. Flagel and Dr. Rogers contained in a series of
10 DSHS standardized assessments. In assessing the opinions at issue, the ALJ wrote:

11 After careful review of the medical evidence, I give minimal weight to
12 these mental assessments of disability, as they are simply not
13 supported by the objective medical evidence discussed in detail above.
14 These opinions are brief and conclus[ory] in form with little in the
15 way of clinical findings to support their conclusions. The assessments
16 are devoid of detailed mental examinations. These opinions are not
17 consistent with the substantial evidence of record, including the
18 objective findings and observations, notes and opinions of the same
19 and other treating and examining physicians. As a whole, these
20 psychologists and psychiatrists appear to have accepted [Plaintiff's]
subjective complaints, and their opinions . . . appear reflective of a
position of "advocate" for [Plaintiff]. As such, the opinions of Dr.
Cotton, Dr. Bondurant, Dr. Rogers and Dr. Rogers are not supported
by the overall evidence of record and they are not afforded significant
weight in this decision making process in accordance with SSR 96-5p.

Tr. 1056.

1 The Court finds that this explanation is supported by substantial evidence in
2 the record. Where a treating or examining physician's opinion is contradicted, an
3 ALJ must "determine credibility and resolve the conflict." *Valentine v. Comm'r of*
4 *Soc. Sec. Admin.*, 574 F.3d 685, 692 (9th Cir. 2009) (quoting *Thomas v. Barnhart*,
5 278 F.3d 947, 956-57 (9th Cir. 2002)). Here, the ALJ correctly resolved the
6 conflict in favor of these physicians' own detailed clinical notes and the thorough
7 findings of Dr. Jensen, another treating physician. In the final analysis, the
8 conclusory findings upon which Plaintiff relies are simply not credible in light of
9 the substantial medical evidence indicating that Plaintiff's auditory hallucinations
10 are well-controlled with medication and do not substantially interfere with his
11 ability to maintain full time employment with appropriate restrictions.

12 **B. Lay Witness Testimony**

13 Next, Plaintiff contends that the ALJ erred in rejecting the lay witness
14 testimony of Scott Penderson, Charles Clifton, William Weidlich, and Edwin
15 Villeza from the first hearing in 2004. ECF No. 19 at 17-20. The Ninth Circuit
16 recently summarized the law on lay witness testimony as follows:

17 Lay testimony as to a claimant's symptoms or how an impairment
18 affects the claimant's ability to work is competent evidence that the
19 ALJ must take into account. We have held that competent lay witness
20 testimony cannot be disregarded without comment and that in order to
discount competent lay witness testimony, the ALJ must give reasons
that are germane to each witness. We have not, however, required the
ALJ to discuss every witness's testimony on a[n] individualized,
witness-by-witness basis. Rather, if the ALJ gives germane reasons

1 for rejecting testimony by one witness, the ALJ need only point to
2 those reasons when rejecting similar testimony by a different witness.

3 *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012) (quotations and citations
4 omitted); *see also Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (holding
5 that an ALJ permissibly rejected the claimant's ex-girlfriend's testimony in part
6 because her "close relationship" with the claimant and "desire to help" him
7 influenced her).

8 Contrary to Plaintiff's assertions, the ALJ offered specific and germane
9 reasons for rejecting these witnesses' testimony. First, the ALJ observed that
10 Plaintiff's mental condition improved significantly shortly after the witnesses
11 testified between November 2004 and March 2005, and that, as a result, their
12 testimony conflicted considerably with the medial evidence. Tr. 1052. In light of
13 the obvious disparities with the objective medical evidence, the ALJ did not find
14 the witnesses' testimony to be particularly probative of Plaintiff's ability to work.
15 Tr. 1052. Second, and in a related vein, the ALJ noted that the testimony was
16 based upon the witnesses' observations of Plaintiff during a relatively short period
17 of time in a homeless shelter. Given that three out of the four witnesses (Messrs.
18 Pederson, Clifton and Villeza) did not remain in close contact with Plaintiff after
19 he left the homeless shelter, and that the fourth witness, Mr. Weidlich, did not
20 supplement his testimony during the ensuing years, the ALJ found that the
testimony did not fairly represent Plaintiff's long-term functioning abilities. Tr.

1 1052. Finally, the ALJ observed that the witnesses' testimony was internally
2 inconsistent on several material points. Tr. 1052. By way of example, the ALJ
3 noted that Mr. Clifton described Plaintiff as antisocial and a "loner," while Mr.
4 Weidlich and Mr. Villeza testified that Plaintiff associated well with other
5 residents in the homeless shelter. Tr. 1052. The ALJ's decision to afford minimal
6 weight to the lay testimony based upon these reasons was not erroneous.

7 **C. Step Five Determination**

8 Finally, Plaintiff contends that the ALJ failed to meet his burden at step five
9 by "disregard[ing] the opinions of treating medical sources identifying severe,
10 marked, and moderate functional limitations without good reason." ECF No. 19 at
11 20. Plaintiff does not, however, identify the specific functional limitations that the
12 ALJ allegedly disregarded. Nor does Plaintiff make any attempt to explain how
13 the ALJ's "disregard" of these limitations was erroneous. Because this argument
14 has not been raised with sufficient particularity, the Court will decline to address it.
15 *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n. 2 (9th Cir.
16 2008) (declining to reach issue where appellant "failed to argue [the] issue with
17 any specificity in his briefing"); *Rogal v. Astrue*, 2012 WL 7141260 at *3 (W.D.
18 Wash. 2012) (unpublished) ("It is not enough merely to present an argument in the
19 skimpiest way, and leave the Court to do counsel's work—framing the argument
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1 and putting flesh on its bones through a discussion of the applicable law and
2 facts.”) (citations omitted).

3 **IT IS HEREBY ORDERED:**

4 1. Defendant’s Motion for Summary Judgment, ECF No. 20, is

5 **GRANTED.**

6 2. Plaintiff’s Motion for Summary Judgment, ECF No. 19, is **DENIED.**

7 The District Court Executive is hereby directed to file this Order, enter
8 Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

9 **DATED** May 16, 2013.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge